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No. 84-854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ECOS ELECTRONICS CORPORATION,

Petitioner,

vs.

UNDERWRITERS LABORATORIES INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the development of a minimum standard for safety and the certification of products meeting that standard by an independent product testing organization can constitute an unreasonable restraint of trade in violation of Section 1 of the Sherman Act where no product has been denied certification under that standard.

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BRIEF IN OPPOSITION

RELEVANT STATUTES[1]

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

[1] Petitioner has quoted outdated versions of two statutes, only one of which is relevant to this action, and omitted mention of a third statute. In accordance with Supreme Court Rule 34.2, therefore, respondent sets forth the pertinent statutes for the Court's information and convenience.

Rule 56(e) of the Federal Rules of Civil Procedure provides, in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

STATEMENT OF THE CASE

A. Proceedings Below

ECOS Electronics Corporation ("ECOS") filed its original complaint on July 13, 1981, alleging that Underwriters Laboratories Inc. ("UL"), an independent testing organization, conspired with plaintiff's competitors and others to exclude ECOS from the market for outlet circuit testers in violation of federal antitrust and state tort laws. (Complaint; A-18-65)[2] The district court granted UL's motion to dismiss that complaint on the ground that ECOS had never asked UL to "test and list its product."[3] (Order, Dec. 21, 1981, Docket Entry No. 77) Rather than submitting its device to UL for examination and possible Listing, ECOS amended its complaint, alleging that it would be a "useless act" to do so. (Amend. No. 1, ¶ 58(e), Docket Entry No. 91) When the district court indicated it was inclined to dismiss the amended complaint on UL's renewed motion, ECOS filed a second amendment seeking to forestall another dismissal. (Tr. of Proceedings, June 28, 1982, p. 27; Amend. No. 2; A-66-90)

ECOS's second amended complaint, based on what ECOS termed very substantial discovery, alleged that UL conspired

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[2] In this brief, "A" refers to Petitioner's Appendix.

[3] The term "List," as used by UL, indicates certification of compliance with UL's minimum safety requirements.

with ECOS's competitors and others to "imbed" into the market purportedly inferior outlet circuit testers. ECOS contended that, but for the alleged conspiracy, UL would not have Listed ECOS's competitors' products, and without the competition of UL Listed products, ECOS could have sold larger volumes of its more expensive tester, and thereby reduced its costs and its prices to the benefit of consumers. (Amend. No. 2, ¶¶ 58(p), (q); A-86-88; Tr. of Proceedings, June 28, 1982, p. 19 and Sept. 15, 1982, p. 4) UL responded with a third motion to dismiss and, in the alternative, for summary judgment.

On July 29, 1983, the district court granted UL's motion and issued a memorandum opinion. (Order; A-11-14) The district court held that ECOS had failed to allege an unreasonable restraint of trade and held further that ECOS was unable to establish "that it would have been denied a UL Listing." (Order; A-13) The court summarized its holding as follows:

> Plaintiff's alleged injury results from the claim that it was forced to compete with inferior products. The actions plaintiff complains of, however, are not antitrust violations. The antitrust laws were designed to foster competition by ensuring that everyone had a chance to compete in the market place without the imposition of any artificial barriers. *See e.g. Northern Pacific Railway Co.* v. *U.S.*, 356 U.S. 1 (1958). The antitrust laws were not created to police the quality of products placed into the stream of competition, nor to ensure that one would only have to compete with products of the same quality. The market itself will determine whether products are too inferior to satisfy the public's needs.

(Order; A-12-13)

The Seventh Circuit affirmed the judgment of the district court, holding that ECOS's second amended complaint did not state a claim under the antitrust laws. The court found not only that ECOS had failed to allege an unreasonable restraint of trade, but that the relief sought by ECOS was itself anti-competitive:

> ECOS seeks to avoid the fetters of price competition by claiming that consumers are injured when they choose inferior testers because of the price. A similar argument was raised in *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978), in defense of the Society's refusal to allow members to compete for clients on the basis of price. The Court rejected the claim, finding it "nothing less than a frontal assault on the basic policy of the Sherman Act." 435 U.S. at 695, 98 S.Ct. at 1367. ECOS's attempt to use the antitrust laws as a means of stifling price competition is equally antithetical to the goals of the Sherman Act.
>
> * * * *
>
> The dealings between ECOS and UL make it clear that ECOS wished not only to deny its competitors UL listings, but also to obtain a standard that only ECOS could meet. Use of the antitrust laws for this purpose cannot be countenanced.

(*ECOS Electronics Corp.* v. *Underwriters Laboratories Inc.,* 743 F.2d 498, 502-03 (7th Cir. 1984); A-8)

B. Background

The petitioner's "Statement of The Facts" and "Factual Summary" are argumentative restatements of ECOS's conclusory allegations and fail to correspond to the uncontested record facts as set forth in the Seventh Circuit's opinion. In contrast, the facts summarized below were developed through extensive discovery and stood unchallenged in the district court and in the Seventh Circuit.

UL is an independent, not-for-profit corporation with headquarters in Northbrook, Illinois and with other laboratory facilities in Melville, New York, and elsewhere.[4] UL was

[4] During the relevant period, UL moved its headquarters from Chicago to Northbrook, Illinois. This office and its personnel will be identified as "UL-Chicago" and the Melville, New York office and personnel will be identified as "UL-Melville."

founded in 1894 to operate laboratories for the investigation of products, methods and systems with respect to hazards affecting life and property. UL is a membership corporation and has no capital stock; membership is limited to representatives of consumers, educators, safety agencies, safety and standards experts, government, the insurance industry, public utilities and UL officers.[5] UL is managed by a Board of Trustees elected from its membership. No individual associated with a manufacturer or vendor of products investigated or Listed by UL may be a member or trustee of UL. (743 F.2d at 500; A-3; Bartholf Aff. ¶ 2; Underwriters Laboratories' Answers to Plaintiff's Interrogatories, Nos. 2-5, Docket Entry No. 118)

UL investigates products submitted to it by manufacturers to determine whether the products meet the minimum safety levels specified in UL standards. After examination and testing, UL issues a report of its investigation stating whether the product complies with UL's requirements. A product that complies is eligible to bear a "Listing Mark" and to appear in UL directories. Any product that meets UL's minimum safety requirements may be Listed regardless of its relative quality or limited features in comparison with other Listed products. UL does not engage in relative quality ratings or comparisons of different features of competing products. (743 F.2d at 500; A-3; Bartholf Aff. ¶ 2; DX 31)

When a manufacturer submits a new product not covered by an existing UL Standard for Safety, UL examines and tests the product using its applicable safety requirements for similar products, if any, and any additional test procedures deemed appropriate in light of the cumulative experience of UL engineers. After a sufficient number of products in a category have been submitted to UL for Listing, and after there has been an opportunity for field experience and feedback to occur, UL

[5] UL has no parent or subsidiary corporations.

engineers prepare a proposed standard setting forth test procedures and requirements for the product group. After evaluating comments from interested persons, UL sends a revised draft of the Standard to at least one of five UL Engineering Councils composed primarily of state and municipal government safety inspection authorities and other safety officials.[6] After evaluation of the councils' comments and further modification, UL announces a new UL Standard for Safety, which is then set forth in a printed document available to the public. (743 F.2d at 500; A-3; Bartholf Dep. 41-42, 85-86, 92-95, 101-02, 110; Gloisten Dep. 30-32, 112-13)

Every published UL Standard for Safety contains a statement that UL will investigate and List innovative products which may not be anticipated by the standard. Each standard also provides that the requirements are "subject to revision as further experience and investigation may show is necessary or desirable." (743 F.2d at 500; A-3; Bartholf Aff. ¶ 3 and Ex. A thereto; Gloisten Dep. 115)

UL submits each new Standard for Safety to the American National Standards Institute ("ANSI") for adoption as an ANSI standard. (Kurowski Dep. 23) ANSI is a not-for-profit corporation which serves as a clearinghouse for standards development organizations by prescribing certain deliberative and review procedures. Upon determination that a standard has been formulated in accordance with its procedures, ANSI approves the standard as an American National Standard. (743 F.2d at 500; A-3; Affidavit of William H. Rockwell ¶¶ 2-4, 6-7, attached to [ANSI] Memorandum in Support of Motion to Dismiss Complaint for Lack of Personal Jurisdiction and Improper Venue, Docket Entry No. 43)

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[6] No representatives of manufacturers or vendors are members of these councils.

Development of UL Standard for Safety 1436

In 1964, an outlet circuit tester was submitted to UL's Chicago office by Daniel Woodhead Co. ("Woodhead") for Listing. The Woodhead tester is a simple device that may be plugged directly into an electrical outlet to indicate various circuit conditions by means of three neon lamps that light up in different combinations. On January 6, 1965, UL informed Woodhead that its tester was not eligible to be Listed because it gave incorrect indications under certain conditions. (743 F.2d at 500; A-3; DX 5; PX 1; A-91-96)

In 1972, Woodhead submitted a modified version of its circuit tester, which UL approved for Listing after determining that the device did not operate in a hazardous manner and that it could detect the most common wiring hazards. As a condition of Listing, UL required Woodhead to disclose, by markings on the testing device, the wiring conditions the tester could and could not detect. The Woodhead device was the first outlet circuit tester to receive a UL Listing; similar devices submitted by other manufacturers were Listed soon thereafter. (743 F.2d at 500; A-3-4; DX 2, 3, 5, 9; Skuggevig Aff. ¶¶ 5-6 and Ex. BB thereto; Gloisten Dep. 25) UL concluded: (1) that these devices should be Listed as long as the limitations of each tester were clearly stated on the product and enclosed literature and (2) that Listings would be "dropped" if manufacturers did not comply with the disclosure requirements. (743 F.2d at 500; A-3-4; DX 8-9; Skuggevig Aff. ¶¶ 2-4, 6-7 and Ex. AA thereto; A-109-12)

In 1978, after completing its standards development process, UL published UL Standard for Safety 1436 covering outlet circuit testers. At that point in time, UL's Melville engineers, who had been responsible for developing the standard, were not yet aware of ECOS or its products. ECOS had not submitted its products for Listing, nor had UL engineers had any contact with Woodhead concerning the existence of

ECOS or its products. (DX 18-19, 21, 23; Bartholf Dep. 41-42, 84-85, 139; Gloisten Dep. 33-34, 118-19)

ECOS Contacts with UL

In the fall of 1978, ECOS, a manufacturer of outlet circuit testers, contacted UL to complain that UL Listed outlet circuit testers gave incorrect indications and to request that UL conduct an investigation. In response, UL conducted further tests and found no false indications as asserted by ECOS. In January 1979, UL reported the results of its tests to ECOS and explained that UL required Listees to disclose the limitations of the products and to inform consumers that the testers were not comprehensive diagnostic instruments. (743 F.2d at 500; A-4; PX 6-9; DX 27-28) With regard to ECOS's continued complaints, UL engineers concluded in April 1979:

> I believe that the key to the approach to outlet circuit testers lies in the fact that we consider them to be simple instruments to detect nearly all probable common improper wiring conditions. They are not to be considered a comprehensive diagnostic instrument. Of course, some testers may become more comprehensive than others, but basically those that have been Listed so far have their limitations. Even with the limitations, these devices have provided a testing means much beyond that which the average layman could attain previously. I do not believe we should be brought to the point where our requirements would prohibit the Listing of such simple devices.

(DX 31)

At a meeting with ECOS officials in July 1979 to discuss ECOS's complaints, UL made the first of at least twelve invitations to ECOS to submit its tester for UL Listing. ECOS never submitted its tester to UL, but instead continued to seek delisting of its competitors' products. (743 F.2d at 500, 503; A-4, A-8; PX 11; Bartholf Aff. ¶¶ 4-5, 10; Bartholf Dep. 117-18, 133)

On January 12, 1981, Jack Bono, UL's president, responded to additional complaints from ECOS, writing as follows:

> Your statement that under the present UL Standard you are *unable* to submit your instrument for Listing is incorrect. You have *chosen* not to submit your outlet testers to us for a Listing. We have made many suggestions that you do submit so that a detailed review of your design by our staff can be conducted. This could well result in a Listing of your products.
>
> * * * *
>
> [L]et me repeat, UL would be happy to accept a submittal of your products for investigation, and, if conformity with requirements is determined, for Listing.
>
> It is our opinion that UL1436 is worthy of recognition by ANSI as reflecting practical levels of safety for products covered by its scope. We do not know if the products you manufacture comply with its requirements or not, but we cannot permit the content of that standard to be manipulated so as to preclude from Listing all designs other than yours. Accordingly, I plan to have the staff continue to seek recognition of UL1436 by ANSI in accordance with existing procedures as included in the enclosed UL Method of Development, Revision and Implementation of Standards for Safety.

(743 F.2d at 500; A-4; Bartholf Aff., Ex. B thereto (emphasis in original))

On March 4, 1981, ECOS met with UL-Chicago engineers to discuss the potential submission of ECOS testers to UL for investigation and Listing. ECOS requested that UL not List ECOS's testers with other outlet circuit testers under UL 1436 because the ECOS testers additionally "measure[d] the quality of ground." The UL engineers "agreed to consider the devices on their merits without reference to any category." (743 F.2d at 500; A-4; Bartholf Aff. ¶ 8 and Ex. D thereto; Bartholf Dep. 134-35, 139-42)

On March 25, 1981, UL sent application forms to ECOS for a product investigation, stating:

> [W]hen we receive the signed forms and all other requested items, we will place this project on our active work schedule and notify you of a date by which you may expect a Report of our investigation.

(Bartholf Aff. ¶ 9 and Ex. F thereto; Bartholf Dep. 117-18, 133) ECOS never returned the application forms, nor did it indicate to UL why it had not done so. (743 F.2d at 500; A-4; Bartholf Aff. ¶¶ 4, 10; Bartholf Dep. 135) Rather, ECOS filed the instant lawsuit. Despite entreaties from UL and the district court, ECOS continued to refuse to submit its product to UL for testing and Listing.

Both the district court and the Seventh Circuit concluded that the record did not support ECOS's allegations that UL would have refused a Listing to ECOS; they found instead that ECOS had declined to submit its product to UL. (743 F.2d at 500; A-4)

SUMMARY OF REASONS FOR DENYING PETITION

ECOS contends that UL violated the antitrust laws by "conspiring" to List "inferior" outlet circuit testers manufactured by ECOS's competitors. ECOS asserts that the object of this alleged "conspiracy" was to imbed an "inferior product in the outlet circuit tester market" to the detriment of ECOS's allegedly superior products. (ECOS Pet. 22) ECOS does not contend that its products were excluded from the market, that it was prevented from making known to consumers the advantages of its products or even that it was denied a UL Listing. Instead, ECOS contends that it was placed at a competitive disadvantage simply because its competitors' products were Listed. (ECOS Pet. 23; 743 F.2d at 502; A-8) Thus, ECOS argues that even if it had sought and received a UL Listing, "it

still would be forced to compete" with "inferior" UL Listed products and that consumers would still prefer to purchase the less expensive products rather than ECOS's allegedly superior products. (ECOS Pet. 23)

The district court found that despite extensive discovery, ECOS could not "set forth specific facts showing that there was a genuine issue for trial" regarding this imagined web of conspiracy and intrigue. Fed.R.Civ.P. 56(e); *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 288-90 (1968). (Order; A-12-13) Moreover, both the district court and the Court of Appeals correctly concluded that ECOS's assertions, even if they were taken as true, do not constitute a claim cognizable under the Sherman Act.[7]

The Sherman Act prohibits unreasonable trade restraints. ECOS does not complain, however, that competition was unduly restrained by any acts of UL, but rather that ECOS was "forced to compete" in the marketplace with inferior products. Nevertheless, ECOS urges the Court to extend the holdings of *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) and *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556 (1982), to alleviate these competitive pressures by judicially compelling UL to adopt restrictive standards that would require the delisting of the products of ECOS's competitors. As the Seventh Circuit correctly concluded, "plaintiff's claim would seem to be a poorly disguised attempt to use these [antitrust] laws to stifle competition." (743 F.2d at 501; A-6)

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[7] ECOS argues that the entry of judgment for UL in the courts below should be treated as a dismissal "on the pleadings." (ECOS Pet. at 5 n) The Seventh Circuit expressly went beyond the pleadings, however, in its statement of facts and in its finding that ECOS refused to submit its product for Listing. (743 F.2d at 500, 501 n.1; A-3-4, A-5)

ARGUMENT

I. THE RELIEF SOUGHT BY ECOS IS INIMICAL TO THE PURPOSES OF THE ANTITRUST LAWS.

Section 1 of the Sherman Act prohibits only those combinations or conspiracies which result in an unreasonable restraint of trade. In order to establish a Section 1 violation, therefore, a plaintiff must allege and prove, among other elements, that the challenged practice or activity resulted in a competitively adverse impact in the relevant market. Injury to a competitor is insufficient to constitute a Sherman Act violation; injury to competition must be shown. *See, e.g., Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962). Here, ECOS is unable to show any such injury to the competitive process.[8]

UL is engaged in the investigation and testing of products to determine their conformance with applicable safety requirements. UL does not purport to test or to measure the relative quality levels or features of competing products. A UL Listing simply means that the product has complied with the minimum safety requirements for that product. (743 F.2d at 500; A-3; Bartholf Aff. ¶ 2; DX 31) Many products of varying quality and performance may bear UL Listing Marks, but all must meet UL's minimum safety requirements. Those products are re-

[8] ECOS does not contend that the alleged conspiracy constituted a *per se* violation of the Sherman Act. Thus, ECOS must allege and prove that UL's conduct had an unreasonably adverse effect on competition in a relevant product and geographic market under a rule of reason analysis. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 688, 691 (1978).

quired to ultimately compete in the marketplace on their individual merits.[9]

ECOS does not contend that it was eliminated as a competitor, that its freedom to compete in the circuit tester market was restricted, or that it was precluded from seeking a UL Listing for its product. Instead, ECOS alleges that its competitors have achieved a marketing advantage because their less expensive, less sophisticated products have been Listed by UL. ECOS ultimately is not complaining of any restraint on trade, but that it has been "forced to compete" with allegedly "inferior" and lower-priced products which UL refused to delist. (ECOS Pet. 23) This position caused District Judge Grady to correctly conclude:

> The crux of plaintiff's argument is that it produced a superior product and that only its product should qualify for UL listing. Plaintiff's alleged injury results from the claim that it was forced to compete with inferior products. The actions plaintiff complains of, however, are not antitrust violations. The antitrust laws were designed to foster competition by ensuring that everyone had a chance to compete in the market place without the imposition of any artificial barriers. *See e.g. Northern Pacific Railway Co.* v. *U.S.*, 356 U.S. 1 (1958). The antitrust laws were not created to police the quality of products placed into the stream of competition, nor to ensure that one would only have to compete with products of the same quality. The market itself will determine whether products are too inferior to satisfy the public's needs. Therefore, we hold that plaintiff has not stated an antitrust claim against defendant UL.

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[9] ECOS's contention that UL's Listings restrained trade by debasing the "quality" of goods in the market is unfounded. (ECOS Pet. 39-42) All manufacturers are free to manufacture products of varying quality and sophistication as they individually deem appropriate. Moreover, any producer can receive a UL Listing if it meets UL's safety requirements and agrees to abide by UL's certification procedures.

(Order; A-12-13) Similarly, in affirming the district court's dismissal of the complaint, the Seventh Circuit succinctly stated:

> ECOS may make its claims concerning the desirability of its testers known to consumers through advertising, but if that fails ECOS may not indirectly force Woodhead to raise its prices by forcing UL to raise its standards.

(743 F.2d at 502; A-8)

Thus, ECOS's claim is at odds with the fundamental purpose of the antitrust laws: to preserve a free and open competitive environment.

II. ECOS'S REQUEST THAT THIS COURT'S HOLDINGS IN *RADIANT BURNERS* AND *HYDROLEVEL* BE EXTENDED TO THE FACTS OF THIS CASE IS WITHOUT LEGAL OR ECONOMIC SUPPORT.

ECOS attempts to bring this case within the scope of the Court's holdings in *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) and *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556 (1982). However, those cases involved exclusionary conduct undertaken by standards organizations, whereas in the instant case, ECOS complains that UL's activities were *not* exclusionary with respect to its competitors. It is clear that *Radiant Burners* and *Hydrolevel* are inapposite and that extension of those holdings as sought by ECOS is without legal or economic basis.

In asking the court to expand the scope of these cases, petitioner has mischaracterized the Seventh Circuit's opinion below, contending that the court held that product standards "are as a matter of law innocent expressions of opinion" and therefore could not constitute trade restraints. (ECOS Pet. ii, 33-36) Nowhere in its opinion did the Court of Appeals hold that standards are, as a matter of law, innocent expressions of

opinion. On the contrary, the Seventh Circuit correctly analyzed this Court's prior decisions in *Radiant Burners* and *Hydrolevel* as standing for the proposition "that the power of a standard-making organization can be abused when it is used to exclude competitors from a market *by denying them the needed stamp of approval.*" (743 F.2d at 502; A-7; emphasis original) Thus, while recognizing that standard-making organizations like UL provide an important, pro-competitive source of information for consumers (743 F.2d at 503; A-9), the court clearly acknowledged that there are circumstances, such as those found in *Radiant Burners* and *Hydrolevel,* where standards can be manipulated by competitors to accomplish exclusionary goals. (743 F.2d at 502; A-7)

Radiant Burners came before this Court following the circuit court's affirmance of the district court's dismissal of the complaint for failure to state a claim. Plaintiff alleged that the defendants, the American Gas Association ("AGA") and its members, manufacturers of gas burners and suppliers of natural gas, combined and conspired to exclude plaintiff's gas burner from the market by refusing to grant it the AGA's seal of approval. Under the AGA's rules, its gas supplying members had agreed not to supply natural gas for use in gas burners that had not been approved by the AGA. Thus, plaintiff's inability to secure that approval, despite the fact that it twice submitted its burner for consideration, effectively excluded its gas burners from the market. Recognizing that these facts were adequate to state a claim for relief, this Court reversed. 364 U.S. at 657-58.

Hydrolevel concerned the propriety of imposing vicarious liability on the American Society of Mechanical Engineers ("ASME") for an unlawful antitrust conspiracy in which its agents had engaged, allegedly acting with the apparent authority of ASME. 456 U.S. at 558-59. As in the case of the AGA, ASME was a membership corporation, and "much of its work" was done by volunteers who were in large part employees of its

industry members.[10] *Id.* at 559. That work included the promulgation and interpretation of codes and standards for various areas of engineering and industry. The plaintiff, Hydrolevel Corporation, manufactured a low-water fuel cutoff device for use in boilers and pressure vessels. Through an elaborate scheme to disparage Hydrolevel's product, several of Hydrolevel's competitors conspired to elicit an advisory opinion from ASME disapproving of the device. By utilizing their dual roles as industry participants and as the ASME subcommittee members charged with formulating and interpreting ASME's Boiler and Pressure Vessel Code, those individuals were able to accomplish their goal to the injury of Hydrolevel's business and of competition generally. *Id.* at 560-64.

The exclusionary conduct underlying *Radiant Burners* and *Hydrolevel* stands in vivid contrast to the claims presented by ECOS in the present case. ECOS never submitted its product for testing and Listing by UL. Indeed, as the court of appeals found, UL repeatedly urged ECOS to submit its product. (743 F.2d at 500; A-4) As early as 1979, UL made the first of at least 12 invitations to ECOS to submit its tester. (Bartholf Aff. ¶¶ 4-5) On March 25, 1981, UL supplied application forms for the submission of ECOS's tester. ECOS never executed or returned the applications to UL. (Bartholf Aff. ¶¶ 9-10 and Ex. F thereto) As the Seventh Circuit observed:

> ECOS . . . did not request a UL listing and now disclaims any interest in obtaining UL's stamp of approval. In essence the caliginous claim of ECOS emerges as a desire that its competitors not be listed by UL.

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[10] In contrast to the make-up of AGA and ASME, it is undisputed that UL "is an independent, not-for-profit corporation . . . managed by 18 trustees elected from its membership, *none of whom may be associated with a manufacturer or vendor of products investigated by UL.*" (743 F.2d at 500; A-3; emphasis added) Moreover, UL's work is done by engineers employed by UL, not by representatives of manufacturers or vendors, and no representatives of manufacturers or vendors are members of UL engineering councils.

(743 F.2d at 502; A-7)

ECOS concedes that *Hydrolevel* and *Radiant Burners* are not controlling, but argues that they should be extended to this case which, it maintains, differs only in the "mechanism" used to restrain trade. (ECOS Pet. 28-29) In fact, this case involves no trade restraint at all, but rather a complaint by an individual manufacturer that UL did *not* restrain trade by imposing restrictive standards on plaintiff's competitors.[11] ECOS contends, however, that UL's refusal to comply with its request is actually injurious to consumer welfare and should therefore be brought under the antitrust laws. Its "novel" argument runs as follows: "UL increases consumer preference for low cost testers by certifying them as safe" and "consumers are injured when they choose inferior testers because of the price." (743 F.2d 502; A-8) In ECOS's view, consumer welfare would be enhanced, therefore, if UL delisted all inexpensive outlet circuit testers and imposed stricter standards which would only allow ECOS-type devices to be Listed. The result would be increased demand for ECOS's products that would allow ECOS to increase production, effect economies of scale and reduce its costs and prices, thus assuring consumers both quality and low price. (Amend. No. 2, ¶¶ 58(p) and (q); A-86-88) As the Seventh Circuit correctly concluded, "plaintiff's claim would seem to be a poorly disguised attempt to use these [antitrust] laws to stifle competition." (743 F.2d at 501; A-6)

ECOS also relies upon the Federal Trade Commission's rulemaking proceedings on Standards and Certification (16 C.F.R. § 457 (proposed), Public Record 215-61) to show that product standards can be used to restrain trade. It is notable,

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[11] Indeed, if UL had surrendered to ECOS's demands to adopt an exclusionary standard, it undoubtedly would have been accused of engaging in an unlawful conspiracy with ECOS by those manufacturers whose products would have been delisted.

however, that in the FTC proceedings, ECOS presented a comprehensive statement of its case against UL accompanied by numerous exhibits which asserted essentially the same claims presented in its complaint in this action. The Presiding Officer made the following finding with respect to ECOS's contentions:

> 418. In summary, ECOS failed to demonstrate that its product was excluded from the market by actions of either NFPA or UL. On the contrary, the record shows that, in the main, ECOS' efforts were aimed at effecting the market exclusion of competing products and that ECOS did not utilize any of the appeal remedies available from both UL and NFPA. Further, it did not avail itself of the UL procedure to secure listing of its product.

(Report of the Presiding Officer on Proposed Trade Regulation Rule: Standards and Certification at 192 (June 1983); Docket Entry No. 224)

To permit ECOS to use the antitrust laws as a vehicle to accomplish a reduction of competition would be contrary to the fundamental objectives of those laws and to this Court's holdings in *Radiant Burners* and *Hydrolevel.* As this Court declared in *National Society of Professional Engineers* v. *United States,* 435 U.S. at 695, such an attempt to circumvent the competitive process represents "nothing less than a frontal assault on the basic policy of the Sherman Act." (*cited with approval in ECOS Electronics Corp.* v. *Underwriters Laboratories Inc.,* 743 F.2d at 502; A-8)

CONCLUSION

For the foregoing reasons, respondent, Underwriters Laboratories Inc., respectfuily requests that the petition for a writ of certiorari be denied and that an award of damages and costs be made pursuant to Rule 49.2 of the Rules of this Court.

Respectfully submitted,

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